

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALLEN BEDYNEK STUMM,

Plaintiff,

v.

OPINION AND ORDER

12-cv-57-wmc

ROBERT A. McDONALD,

Defendant.

Plaintiff Allen Bedynek Stumm alleges in this proposed civil action that the Secretary of the United States Department of Veterans Affairs, Robert A. McDonald,¹ violated the Equal Pay Act of 1963, 29 U.S.C. § 206, and the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 *et seq.*, and discriminated against him on the basis of his sex and age. Stumm asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. Based on the financial affidavit Stumm provides, the court previously concluded that he is unable to prepay the fee for filing this lawsuit. Relying on an incorrect filing date in determining that Stumm's lawsuit was untimely, the court also concluded that it lacked subject matter jurisdiction. (Dkt. #5.) Stumm subsequently filed a motion for reconsideration, pointing out this error (dkt. #7), which the court will now grant.

¹ At the time plaintiff filed his complaint, the Secretary of the U.S. Department of Veterans Affairs was Eric K. Shinseki. Since that date, Shinseki has been replaced by Robert A. McDonald. Accordingly, the court has substituted the current Secretary as defendant, as reflected in the caption of this opinion and in the order below. The clerk of court is directed to modify the caption on the docket to reflect this change.

The next step is for the court to screen the complaint again to determine whether Stumm's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For the reasons that follow, the court will grant Stumm leave to proceed on an Equal Pay Act claim. In all other respects, however, his request for leave must again be denied.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this screening order, the court assumes the following probative facts based on the allegations in his complaint.

In March of 2001, the local human resources office of the Department of Veterans Affairs in Madison, Wisconsin, announced a vacancy for a readjustment counseling specialist and Stumm applied for the position. While Stumm's application was "certified" and he was interviewed, a younger female was ultimately hired. In February of 2004, the same position came open and Stumm again applied. As before, his application was certified and he was interviewed, but a younger female was hired.

Stumm filed claims of age, sex, race and disability discrimination and retaliation with the Department's Office of Resolution Management. After a hearing, it appears from the complaint, though it is not entirely clear, that an EEOC ALJ rejected his claims.

Stumm then appealed that decision. The Office of Federal Operations Appeal reversed the ALJ's decision and entered the following order:

The agency is ordered to take the following remedial actions:
1. Within sixty (60) days of receipt of this decision, the agency shall offer to retroactively place complainant into the position of Veterans' Readjustment Specialist, GS 9. Complainant shall have 15 days from receipt of the offer to accept or decline the offer. Failure to accept the offer within 15 days will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented a response within the time limit.

(Compl. (dkt. #1) p.4.)

On April 9, 2008, the local veterans agency offered Stumm a readjustment counseling specialist position GS 9 to begin retroactive to April 22, 2005. Stumm contends that this retroactive start date was still a full year after the position's original start date of April 22, 2004. In an April 18, 2008, letter, Stumm objected to the offer's effective date, while neither accepting nor declining the offer itself. In that letter, Stumm did state that, "I will accept the GS 11, no trial, benefits, as cited, as such would be in compliance with the OFO's intentions, decision, mandates, & resolutions." (*Id.*)

In response, the local veterans agency submitted a second offer, dated May 12, 2008, with a start date of May 3, 2004. Stumm contends that this second offer was also "deceptive" because (1) the beginning date was one day later than that of the person who was hired in 2004, and (2) the offer had the wrong title of therapist, no promotion to GS 11, and no step level or locality pay area adjustments. Allegedly for these reasons, Stumm again objected to the offer without accepting or declining it.

On August 15, 2008, the Office of Resolution Management sent a follow up letter to Stumm, which stated in part that: “While the Agency’s first two offers of employment failed to comply with the OFO Order, the record shows that these deficiencies were corrected, and on Aug 1, 2008, the Agency issued you another offer of employment containing the correct hire date and current grade.” (*Id.* at p.5.) Though his pleading is unclear, it appears that Stumm objected yet again to this third offer on August 25, 2008, complaining that the offer was for Step 4, rather than the Step 5 offered the original hiree in 2004.

On December 4, 2008, Stumm received a final letter from the local veterans agency, advising “that as you failed to timely accept any of the positions offered to you, the Agency has withdrawn these offers.” (*Id.* at 6.)

OPINION

I. Timeliness

In addition to the above allegations in his complaint, Stumm also attached to the complaint a decision by the United States Equal Employment Opportunity Commission, Office of Federal Operations, dated November 15, 2011, in which the EEOC informs Stumm that his request for reconsideration of its June 22, 2011, decision was denied. (Dkt. #1-1.)² The court may also consider this decision in screening Stumm’s complaint. Fed. R. Civ. P. 10(c) (“A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”). Plaintiff filed the present complaint on January

² The background section of the decision appears largely consistent with the allegations in Stumm’s complaint.

26, 2012, approximately 72 days after the date of the EEOC letter, and well within the 90 day requirement under 42 U.S.C. § 2000e-5(f)(1). Accordingly, the court finds plaintiff's complaint timely, at least as evidenced by the face of the EEOC letter.

II. Claims

Stumm primarily complains of age and sex discrimination, but also mentions “race, disability and retaliation.” (Compl. (dkt. #1) p.4.) Because the court can only discern sex and age discrimination claims based on Stumm's allegation that a “younger female” was hired on two occasions instead of him, the court will consider whether Stumm has stated a claim for (2) sex discrimination under Title VII, 42 U.S.C. § 2000e *et seq*, and relatedly a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and (2) age discrimination under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 623.

A. Title VII Sex Discrimination Claim

Stumm alleges that on two occasions a younger female employee was hired as a readjustment counseling specialist instead of him. Title VII provides:

It shall be an unlawful employment practice for an employer – (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Ordinarily, in a failure-to-promote claim, the plaintiff would need to plead “that the plaintiff (1) was a member of a protected class; (2) that he was qualified for the position; (3) that he was rejected for the position; and (4) that the position was given to a person outside the protected class who was similarly or less qualified than he.” *Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010) (citing *Jackson v. City of Chicago*, 552 F.3d 619, 622 (7th Cir. 2009)). Because Stumm is a male, complaining of sex discrimination, a so-called “reverse discrimination” claim, the first element is replaced with a requirement that the plaintiff must plead “background circumstances” suggesting that the employer discriminates against the majority. *Stockwell*, 597 F.3d at 901 (citing *Farr v. St. Francis Hosp. & Health Ctrs.*, 570 F.3d 829, 833 (7th Cir. 2009)).

Under a fair reading of Stumm’s complaint here and reasonable inferences drawn from the complaint, Stumm alleges that (1) he was qualified for the position of a readjustment counseling specialist; (2) he was rejected from that position; and (3) the position was instead given to a woman who was similarly or less qualified. Even so, there is no allegation to satisfy the first element in a reverse discrimination case -- some “background circumstances” suggesting that the VA discriminates against men. Accordingly, the court finds that Stumm has failed to state a claim under Title VII for sex discrimination and will deny him leave to proceed on that claim.

B. Equal Pay Act Claim

Stumm’s complaint also invokes the Equal Pay Act (“EPA”). Generally, “the Equal Pay Act ‘prohibits discrimination in wages based on gender.’” *Cherry v. Univ. of*

Wis. System Bd. of Regents, 265 F.3d 541, 550 (7th 2001) (quoting *Varner v. Ill. State Univ.*, 226 F.3d 927, 932 (7th Cir. 2000)). More specifically, the Equal Pay Act, 29 U.S.C. § 206(d), reads in relevant part:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex[.]

To state a *prima facie* case for an EPA violation, a plaintiff must show: (1) he was compensated differently than a female employee; (2) he and the female employee performed equal work requiring equal skill, effort, and responsibility; and (3) they had similar working conditions. *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 793 (7th Cir. 2007). Unlike claims for sex discrimination under Title VII or the Equal Protection Clause, a claim under the EPA does not require proof of discriminatory animus. *Varner*, 226 F.3d at 932.

Here, plaintiff's allegations are sufficient to state a claim under the EPA. Stumm alleges that the offers for readjustment counseling specialist position he received either (1) were not back-dated to the proper date (thus impacting his retroactive pay amount) or (2) were for the wrong step level and did not account for locality pay adjustments. Reading plaintiff's complaint broadly, as the court must at the screening stage, it would

appear that the two women who were hired instead of him for the vacant positions *were* paid at their appropriate step level, commencing at their promotion or hiring date. Accordingly, the court will allow Stumm leave to proceed on an EPA claim.³

C. Age Discrimination in Employment Act Claim

The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 623, protects employees who are at least 40 years old and have received less favorable treatment than employees who are both “substantially younger” and “similarly situated.” *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 470 (7th Cir. 2000). “‘Substantially younger’ means at least a ten-year age difference.” *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1141 (7th Cir. 1998) (quoting *Kariotis v. Navistar Int’l Transp. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)). Stumm does not allege his age, nor does he allege the age of the two women who received the position for which he had applied. Moreover, there are no allegations in the complaint from which the court can infer reasonably that Stumm was at least forty years old at the time he was denied the readjustment counseling specialist positions, or that the women who were hired were at least ten years younger than him. Accordingly, the court will deny Stumm leave to proceed on an ADEA claim.

³ The court notes that the EEOC found that Stumm had failed to respond timely to the Veterans Affairs’ offer of reinstatement. Whether Stumm’s failure to respond as required in that offer somehow bars his claims here is a matter for another day.

ORDER

IT IS ORDERED that:

1. Plaintiff Allen Bedynek Stumm's motion for reconsideration (dkt. #7) is GRANTED.
2. Plaintiff's request to proceed on his claim that defendant Robert A. McDonald violated his rights under the Equal Pay Act is GRANTED. In all other respects, plaintiff's request for leave to proceed is DENIED and those claims are dismissed without prejudice.
3. The summons and complaint are being delivered to the U.S. Marshal for service on defendant Robert A. McDonald.
4. For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.
5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 10th day of September, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY

District Judge